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Supreme Court, U.S.
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No. 02-0371

In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

KEVIN LAMONT HICKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition fails to raise any doubt whatsoever about the need for this Court to review the decision below. Respondent does not and cannot contest that the first question presented by the petition – whether a criminal defendant may invoke the overbreadth doctrine when he was not engaged in expression and his conduct was not proscribed by the unwritten policy he seeks to challenge – is an important federal question that has not been, but should be, decided by this Court. Quite simply, this Court, having created the overbreadth doctrine as an exception to the general rules of Article III standing, should articulate clear limits on when a criminal defendant may invoke the doctrine to avoid conviction. Further, respondent does not and cannot refute the fact that the second question – whether, in the context of the government's attempts to exclude some non-residents from a public housing complex, the Constitution recognizes a distinction between actions undertaken by government as landlord and actions taken by government as sovereign – has divided the federal courts of appeal and the state appellate courts. Nor does respondent dispute that the decision below, which didn't recognize the distinction, is in conflict with this Court's decision in *Department of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125 (2002), which recognized such a distinction in the context of eviction from public housing. In sum, respondent implicitly concedes that these issues are worthy of this Court's review.

Respondent opposes this Court's review only by contending that this case is not a good vehicle for resolving these fundamental issues. In doing so, the respondent (1) misconstrues the arguments below, (2) misstates clearly established facts, (3) misapprehends decisions of other courts, and (4) misunderstands the law. Once the flaws in

respondent's contentions are exposed, it becomes clear that review should be granted.

1. Respondent misconstrues the nature of the arguments below when he insists that Virginia has failed to preserve either issue. To the contrary, both issues were addressed below and, thus, are properly preserved for review by this Court.

a. First, the issue of whether a criminal defendant may invoke the overbreadth doctrine when he was not engaged in expression and his conduct was not proscribed by the unwritten policy he challenged is essentially a question of whether respondent can bring an overbreadth challenge. This question was litigated extensively in the lower court. Indeed, the majority opinion explicitly acknowledges that Virginia argued "Hicks is not entitled to challenge the constitutional validity of the Housing Authority's practices or policies in the criminal prosecution for trespass." *See* App. at 7. The dissenting opinion begins by stating "[t]he majority reaches this issue by allowing the defendant to make a facial challenge to the Authority's trespass policy. I do not believe that such a challenge is permissible in this case." *Id.* at 17. In other words, whether respondent could bring an overbreadth challenge was a question raised and decided below. Thus, the issue is fully preserved for this Court's review.

b. Second, the issue of whether, in the context of the government's attempts to exclude some non-residents from a public housing complex, the Constitution recognizes a distinction between actions undertaken by government as landlord and actions taken by government as sovereign is essentially a question of whether sidewalks within Whitcomb Court, a public housing complex, are constitutionally different from common ordinary sidewalks along a public street. This issue, too, was litigated extensively in the lower court. Indeed, a bare majority of the Virginia

Court of Appeals based its entire en banc decision on the absence of such a distinction. App. at 43. The Virginia Supreme Court majority decided the case on overbreadth grounds and, therefore declined to reach the question. *Id.* at 16. Thus, the issue is fully preserved for this Court's review.

2. Respondent misstates the clear factual record in this case. Respondent's brief suggests that, when he was arrested, he was on a public sidewalk outside of Whitcomb Court, that he was engaged in expressive activity, and that he intended to engage in activity that was explicitly prohibited by the unwritten policy he challenged as overbroad. However, a careful examination of the undisputed facts in this case reveals the exact opposite to be true. At the time of his arrest, the respondent was inside Whitcomb Court, was not engaged in expressive activity, and did not intend to engage in an activity reached by the unwritten policy challenged.

a. First, respondent suggests that he was not within the public housing complex, but on the sidewalk of a public street adjacent to the public housing complex when he was arrested. Resp. at i, 1, 3. The suggestion is inaccurate. When the respondent was arrested, he was on a sidewalk adjacent to Bethel Street. App. at 6. As the lower court noted, "Bethel Street is one of the streets that the City conveyed to the Housing Authority and that *street is located entirely within Whitcomb Court.*" *Id.* (emphasis added). Any doubt about the correctness of the lower court's conclusion is eliminated by an examination of the map of Whitcomb Court set out on page 97 of the Appendix. The map shows clearly that Bethel Street begins and ends at the borders of the Whitcomb Court housing complex. Thus, any suggestion that respondent was not on the property of Whitcomb Court is simply wrong.

b. Second, respondent implies that he was engaged in expressive conduct when he was arrested. *See* Resp. at 7.

The implication is untrue. At the time of his arrest, respondent claimed to be there "to bring pampers for his baby." App. at 61. However, there is no evidence that the officer saw any pampers, and no other evidence corroborating respondent's claim that he was engaged on such an errand. Even if respondent was delivering diapers to the mother of his child, such activity is not expression and does not implicate a fundamental right. *See Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) ("The Court has not extended constitutional protection to mere visitation with family members"). Thus, respondent was not engaging in constitutionally protected conduct.

c. Third, respondent claims that he intended to engage in conduct that was proscribed by the government policy that the lower court found to be overbroad *See* Resp. at 7-8. This claim is false. As a careful review of the majority opinion makes clear, the lower court did not find the written policy prohibiting persons "who cannot demonstrate a legitimate business or social purpose for being on the premises" to be overbroad. Rather, the lower court found overbroad the *unwritten* policy that required advance approval for leafleting, an activity that generally is constitutionally protected. App. at 15-16. There is no evidence that the respondent had engaged in leafleting in the past or that he intended to do so in the future. Thus, he cannot claim that he intended to engage in the conduct proscribed by the unwritten policy that the lower court found overbroad. Moreover, there is no evidence that the Respondent had a constitutionally protected purpose for visiting Whitcomb Court at the time of his arrest. As noted above, "mere visitation with family members" does not implicate a constitutional right. *See Thompson*, 250 F.3d at 407. This is especially so when, as here, there is no evidence that his mother, the mother of his child, or any other resident of Whitcomb Court invited him on the premises.

In sum, the record establishes that respondent was arrested on the property of a public housing complex, that he was not engaged in protected activity at the time he was arrested, and that he had no intention of engaging in the sort of expressive activity reached by the unwritten policy found to be overbroad by the court below. Given these undisputed facts, this Court can resolve both of the questions presented for review.

3. Respondent misapprehends the scope of the decisions of federal courts of appeal and state appellate courts on these questions when he asserts that there is no conflict among them. To the contrary, a review of the cases indicates a clear and broad conflict. For example, in *Thompson* and *Daniel v. City of Tampa*, 38 F.3d 546 (11th Cir. 1994), the Sixth and Eleventh Circuits held that application of trespass after warning statutes by public housing authorities was constitutional. *See Thompson*, 250 F.3d at 408; *Daniel*, 38 F.3d at 550. In contrast, the court below held that the application of Virginia's trespass after warning statute to an individual who was within Whitcomb Court was unconstitutional. Similarly, in *City of Bremerton v. Widell*, 51 P.3d 733 (Wash. 2002) and in *Minnesota v. Holiday*, 585 N.W.2d 68 (Minn. App. 1998), state appellate courts held that a government-owned housing complex generally could exclude trespassers from the premises. *See Widdell*, 51 P.3d at 741; *Holiday*, 585 N.W.2d at 71. In contrast, the court below held that a person, who had been convicted of trespass in the past and had been told not to return, could not be convicted of trespass when he was discovered clearly within the property of Whitcomb Court. In short, the result below, that a non-resident may not be excluded from the property of a public housing complex after being warned not to return, is directly contrary to the broad holdings of two federal courts of appeal and the state appellate courts in both Washington and Minnesota. The only decision that remotely agrees with the court

below has been vacated and the matter set for rehearing en banc. *See Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 203 (5th Cir. 2001), *vacated and reh'g en banc granted sub nom. De La O v. Hous. Auth.*, 289 F.3d 350 (5th Cir. 2002).

More importantly, decisions of other courts have recognized, at least implicitly, that there is a constitutional distinction between the government acting as sovereign and the government acting as the landlord of a residential apartment complex. Their decisions acknowledge that rules and regulations that may not be constitutional when applied to society as a whole are both constitutional and appropriate when applied to a residential apartment complex owned and operated by a governmental entity. In contrast, the court below implicitly treated the sidewalks within Whitcomb Court the same as sidewalks along the public city streets. Such a result contradicts *Rucker* and the holdings of other federal and state appellate courts. This Court should grant review to resolve the conflict.

4. Respondent misunderstands the law. Respondent contends that because this case arose in *state* court, this Court may not determine whether he may invoke the overbreadth doctrine. Resp. at 8-9. Respondent also contends that there are numerous alternative grounds for declaring the Housing Authority's policy unconstitutional and, thus, a review by this Court will not reach the questions presented. Resp. at 15. As a matter of law, neither of these contentions is correct.

a. First, the fact that a case arises in state court is irrelevant to the application of substantive *federal* constitutional law. This case arose in state court because respondent was being prosecuted for violation of the state's criminal trespass law. But respondent chose to raise federal constitutional defenses. State courts, like the lower federal courts, must follow the decisions of this Court in

resolving federal constitutional issues, including the overbreadth doctrine. The federal Constitution does not mean one thing in the lower federal courts and another in the state courts. While the Virginia Supreme Court is free to devise its own general rules of standing in its own courts, and to devise its own standards for a *state* overbreadth doctrine, it did not purport to do so here. Indeed, it expressly relied on what it perceived to be this Court's overbreadth doctrine. App. 8-15. It is well-established that a state court "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (emphasis original). Yet, because it misunderstood this court's jurisprudence, the Virginia Supreme Court did impose greater restrictions – as a matter of federal law – than are warranted by the jurisprudence. It expanded the scope of the federal overbreadth doctrine in an unprecedented manner. The fact that the lower court is a state tribunal does not preclude this Court from reviewing its erroneous application of a federal constitutional standard. *See* 28 U.S.C. § 1257 ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ").

Moreover, respondent's position, that state courts can impose different standards for the application of federal constitutional law, is a recipe for constitutional chaos. The vast majority of criminal cases arise in the state courts. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). To the extent that those cases raise federal constitutional issues, the "state courts are required to apply federal constitutional standards, and they necessarily create a considerable body of 'federal law' in the process." *Id.* Because of the

need for a uniform body of federal constitutional law, "ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Id.* at 1041. Consequently, this Court cannot allow the state courts to apply varying standards for the application of federal constitutional law. Indeed, the fact that the lower court did so is a compelling reason for granting review. Accordingly, it is no jurisdictional barrier to this Court's consideration of the case.

b. Second, there are no alternative grounds for declaring the Housing Authority's unwritten policy unconstitutional. Respondent argued below that the *sidewalks along a street closed to the public and completely within a public housing authority* constituted a public forum. However, no decision of this Court supports such an argument.[1] Indeed, this Court has cautioned that not all sidewalks constitute a public forum, *United States v. Grace*, 461 U.S. 171, 179-80 (1983), and that the "mere characteristics of the property cannot dictate forum analysis." *United States v. Kokinda*, 497 U.S. 720, 727 (1991). Moreover, the only federal appellate court to address the issue concluded that property within a public housing complex is not a public forum. *See Daniel*, 38 F.3d at 550. Furthermore, even if this Court

[1] The fact that this Court has never resolved the question and that Respondent has indicated an intention to raise it if review is granted actually provides further support for granting review, especially because this additional question falls squarely within the second question presented. Quite simply, if review is granted, this Court will have the opportunity to resolve another important federal question that has not been, but should be, decided by this Court. Alternatively, the Court could resolve the other questions presented and remand the case to the Virginia Supreme Court for it to consider this issue in light of the decision in *Rucker*.

determined that sidewalks within a public housing complex constituted a public forum, this Court would still have to resolve whether the overbreadth doctrine permits respondent, who was engaged in criminal trespass and not in any constitutionally protected conduct, to bring a challenge to the Housing Authority's policy.

Additionally, respondent argued below that the Housing Authority's policy violates his right to intimate association. However, this Court has not extended constitutional protection to "mere visitation with family members" or friends. *Thompson*, 250 F.3d at 407. Thus, there is no constitutional right implicated. Furthermore, even if this Court determined that there is a constitutional right to visit family members or friends, there is no suggestion in this case that the mother of respondent's child or his own mother, both of whom are residents of Whitcomb Court, invited or welcomed respondent's visit. Nor is there any evidence that any other resident of Whitcomb Court wished to associate with respondent. Consequently, even if there is a right to visit family and friends, respondent lacks standing to bring such a claim.

In sum, this case presents an excellent vehicle for resolving the questions presented. It provides the Court an opportunity to define the limits of overbreadth standing and to determine the scope of the distinction between government acting as landlord and government acting as sovereign established in *Rucker*. Both issues were presented and, at least implicitly, decided below. The clear factual record indicates that the Respondent was within Whitcomb Court, was not engaged in expressive conduct, and did not intend to engage in conduct that violated the unwritten policy he challenged. Neither the fact that this case arises from state court nor respondent's proposed alternative grounds for affirmance preclude this Court

from reaching the merits of the issues. Accordingly, review should be granted.

CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the *amicus* brief, the petition for writ of certiorari should be granted.

Respectfully submitted:

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